Supreme Court of the United States

OCTOBER TERM, 1940.

MAR 14 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE MATTER

of

DEEP ROCK OIL CORPORATION, a corporation,
Debtor.

No. 846

STANDARD GAS AND ELECTRIC COMPANY, a corporation,
Petitioner,

v.

DEEP ROCK OIL CORPORATION, Debtor, HENRY N. GREIS, Trustee, JOHN J. SHINNERS, NEWTON P. FRYE, ROBERT F. HOLDEN, JOHN H. MASON, ALBERT J. ROBERTSON, and CHARLES S. SARGENT, as a Reorganization Committee, JOHN M. TAYLOR, OSCAR A. KENNEDY, and H. RUSSELL HASTINGS, as Independent Preferred Stockholders Committee.

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PETITION FOR WRITS OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

A. LOUIS FLYNN,
JACOB K. JAVITS,
WILBUR J. HOLLEMAN,
SELIG J. LEVITAN,
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INDEX

Subject Index

PAGE

PETITION FOR WRITS OF CERTIORARI 1

Introductory Statement 2

Statement of the Matter Involved 3

Questions Presented 7

Reasons for Granting Certiorari 8

Prayer 12

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI 15

Opinion of Court Below 15

Jurisdiction 16

Questions Presented 16

The Statutes Involved 18

Statement of the Case 18

Specifications of Error 19

Summary of Argument 20

Argument 21

I. Where a debtor is not insolvent, and where provision has been made for the full satisfaction of the prior rights of creditors, leaving only the participation of stockholders to be considered, a plan of reorganization may not be confirmed without the consent of excluded creditors and stockholders, unless payment or protection is provided for such excluded creditors and stockholders in a manner prescribed in Section 216(7) and (8) of the Bankruptcy Act, as amended 21

PAGE

II. Equity requires the reorganization court to take into consideration in the determination of whether the plan is fair and equitable to Standard (under the particular circumstances of this case) (1) the actual prices paid by holders of notes and preferred stock who acquired such securities during the pendency of the reorganization proceedings at discounts below their face value, and (2) the evidence received by the District Court subsequent to the decision by this Court in the *Taylor* case.. 28

Conclusion 33

Exhibit A 35

Table of Cases Cited

PAGE

Campbell v. *Alleghany Corporation,* 75 F. (2d) 947 (C. C. A. 4th, 1935), cert. den. 296 U. S. 581....10, 24
Case v. *Los Angeles Lumber Products Co. Ltd.,* 308 U. S. 106, 60 S. Ct. 1, 84 L. Ed. 110 (1939)..9, 21, 26
In re Consolidated Rock Products Co., —— U. S. —— (October Term, 1940, Nos. 400 and 444)..9, 21, 22, 26

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.,* 240 U. S. 251, 36 S. Ct. 269, 60 L. Ed. 629 (1916).... 2

Louisville Jt. Stock L. B. v. *Radford,* 295 U. S. 555, 55 S. Ct. 854, 79 L. Ed. 1593 (1935)..... 23
Louisville Trust Co. v. *Louisville, New Albany and Chicago Railway Co.,* 174 U. S. 674, 684..... 9

In re 620 Church Street Bldg. Corp., 299 U. S. 24, 81 L. Ed. 16, 57 S. Ct. 88 (1936).....9, 21

Southern Pacific Company v. *Bogert,* 250 U. S. 483, 39 S. Ct. 533, 63 L. Ed. 1099 (1919).....12, 32
Standard Gas and Electric Company v. *Taylor,* 113 F. (2d) 266, *cert. den.* —— U. S. —— (October Term, 1940, No. 465), 85 L. Ed. 85.....2, 3, 6, 24

Taylor v. *Standard Gas and Electric Company,* 306 U. S. 307 .....2, 30, 32
Thomas v. *Brownville etc. R. Co.,* 109 U. S. 522, 526, 3 S. Ct. 315, 27 L. Ed. 1018, 1020 (1883).....12, 32

In re Utilities Power & Light Corporation (C. C. A. 7th, March 9, 1940) 23

Statutes Cited

PAGE

Section 240 (a) of the Judicial Code, as amended (28 U. S. C. A. Section 347) 16

Sections 179, 216 (7), 216 (8), and 221 of Chapter X of the Bankruptcy Act, as amended (11 U. S. C. A. Sections 579, 616, 621) 18, 21, 24, 25

Section 276 (c) (2) of Chapter X 18

Other Authorities

34 Ill. Law Review 94 (1939) 30

25 Va. Law Review 849 (1939) 30

39 Col. Law Review 907, 927, 928 (1939) 30

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Standard Gas and Electric Company, by its counsel, A. Louis Flynn, Jacob K. Javits, Wilbur J. Holleman and Selig J. Levitan, alleges:

INTRODUCTORY STATEMENT

Petitioner prays that Writs of Certiorari issue to review the judgment and decision of the Circuit Court of Appeals for the Tenth Circuit entered on January 13, 1941 (R. 1687) affirming orders of the District Court for the Northern District of Oklahoma approving (R. 1385) and confirming (R. 1397) a plan of reorganization which denies to Standard Gas and Electric Company (hereinafter referred to as Standard) any participation in the reorganized company upon its amended claim in the amount of $6,129,248.36, or as a common stockholder or for the stock and assets of the Refining Company. Appeals to the Circuit Court from both orders were consolidated (R. 1688).

On November 12, 1940, this Court denied the petition of Standard for certiorari to review a decision of the Circuit Court of Appeals for the Tenth Circuit, reported in 113 F. (2d) 266, (R. 1372) which affirmed, on the ground of the decision of this Court in *Taylor* v. *Standard Gas and Electric Company*, 306 U. S. 307, an order of the District Court for the Northern District of Oklahoma (R. 159) denying to Standard any participation as a creditor and directing Standard to deliver to the Trustee of the Debtor the stock and assets of the Refining Company. U. S. , October Term, 1940, No. 465, 85 L. Ed. 85.

This petition seeks the review of orders approving and confirming the plan of reorganization. The order of confirmation is the final and dispositive order which completely and permanently excludes Standard from participation in the assets of the Debtor. Petitioner in filing this petition is prompted to do so by the doctrine expressed in *Hamilton-*

Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U. S. 251, 36 S. Ct. 269, 60 L. Ed. 629 (1916), concerning the effect of a refusal of an application for a writ of certiorari to review an interlocutory decision, and concerning this Court's power to correct an erroneous interlocutory decision which it had previously declined to review.[1] In view of that doctrine, Standard's tremendous net cash investment in Deep Rock of $20,567,763.74 (R. 1270) obliges it, in the interests of its 58,000 public security holders (R. 1268), to seek from this Court a last opportunity to correct the decisions of the courts below.

STATEMENT OF THE MATTER INVOLVED

The facts, in so far as they relate to the plan of reorganization confirmed below, the distribution of securities thereunder, the value of the Debtor's assets, and the elimination of Standard's interests as a creditor and common stockholder are set forth in the opinion of the Circuit Court of Appeals (R. 1687). The plan itself appears at page 1466 of the Record.[2] We supplement such statement only

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[1]The Circuit Court of Appeals in the decision reported in 113 F. (2d) 266 (R. 1377-1378), relating to the order of February 29, 1940, which subordinated Standard's claim, stated that the order of approval of the Plan of Reorganization "is not a judgment. It is but a step in the administration of the Debtor's estate. * * * If, before the final *consummation* of any plan of reorganization, the assets of Deep Rock should so increase in value that there would be a substantial equity to be applied to the satisfaction of Standard's claim, the Court under its broad equitable powers would have power to procure a modification of the plan to make this equity available to Standard."

[2]Pursuant to a stipulation of the parties, the Record on this petition includes the Record filed in Case No. 465, October Term, 1940 (R. 1697).

to the extent deemed material to the issues presented by this petition.

On January 29, 1940, the Trustee filed a report (R. 123) to which was attached a summary of a statement received from the holders of notes and preferred stock in response to an order of the District Court (R. 133). Of the holders of 70.13% of notes who responded to the order of the District Court, approximately two-thirds had purchased their securities subsequent to March 1, 1933 (the date of the beginning of the proceedings), some at prices as low as 20% of the principal amount of such notes (R. 133). The precise prices paid by note holders were not disclosed, but attached to the report of the Trustee were statements of the market prices at which notes and preferred stock of the Debtor were traded in since March 1933 (R. 134-137). It will be observed that since March 1933, such notes have been traded in "flat" *i.e.*, the prices have been inclusive of accrued interest. It will also be observed that out of the $4,114,500 principal amount of notes reported to have been acquired after the inception of the proceedings, $3,000,000 principal amount were acquired at less than 75% of face value, "flat" (*i.e.*, inclusive of accrued interest) (R. 133). Accrued interest during the receivership (since March 1, 1933)—not paid for by those who purchased their securities "flat"—amounted to $4,350,000 (or 43.5% of principal) on May 31, 1940 (R. 1690).

The same report shows with respect to the preferred stock that reports were received from the holders of 62.75% of the outstanding stock; that approximately 25% of the reporting stock was purchased or acquired subsequent to

March 1, 1933, some at prices less than $5. per share and all but 512 of such reporting shares at less than $25 a share (R. 134).

The District Judge, in his findings of fact of February 29, 1940, found that "since the inception of the receivership proceedings and the reorganization proceedings of the Debtor", large percentages of notes and preferred stock of the Debtor have been acquired by the present holders "at prices substantially below the principal amount thereof in the case of notes, or the preferential rights in liquidation in the case of the preferred stock" (R. 150). When the District Court admitted the Trustee's report in evidence, he stated that its subject matter was relevant to the measurement of the rights of notes and preferred stockholders "according to equitable principles" (R. 1239).

Notwithstanding the order of December 15, 1939 (R. 72) and the report of the Trustee pursuant thereto, the District Court, in the order of July 24, 1940, confirming the Plan of Reorganization (R. 1397), found that it would be impracticable to require the holders of securities of Deep Rock to file a statement showing the prices paid therefor due to the number of securities outstanding and the extent of public dealing therein. The record contains no evidence which supports this finding in the order of July 24th. The District Court disregarded the facts disclosed by the Trustee's report pursuant to the order of December 15th, and approved the plan as fair and equitable.

Standard respectfully refers this Court to, and prays that this Court read particularly the evidence at pages 1264-1271, 1275-1276, and 1296-1307 of the Record. This evidence was given early in 1940, after the decision by this

Court in the *Taylor* case. It contains facts relating to Standard's amended claim and relations with Deep Rock prior to March 1, 1933, which were not before this Court in the record in the *Taylor* case and which bear directly on the issue of the fairness of a plan of reorganization which excludes Standard from participation. This evidence in specific detail negates the charges in the *Taylor* case of abuse of Deep Rock by Standard.

Granted the subordination of Standard, there is no question in this case about the fact that the Debtor's assets ($17,640,415) exceed the Debtor's liabilities ($14,-350,000). (Opinion the Circuit Court of Appeals (R. 1689).) Standard, as a creditor, and the common stockholders as a class, were given no opportunity to accept or reject the plan, notwithstanding that fact.

The Circuit Court of Appeals affirmed the orders of approval and confirmation (R. 1691) on the ground that under its previous decision (reported at 113 F. (2d) 266[1] (R. 1372 *seq.*)), Standard is not entitled to any participation. The previous decision in effect held that the Circuit Court was bound by this Court's decision in the *Taylor* case to subordinate Standard's claim even to the point of excluding Standard from participation in the reorganization of the Debtor. Thus it is argued that the decision below is the inevitable consequence of this Court's decision in the *Taylor* case. To Standard's contention that the facts showed that it was not impracticable to require the holders of securities to file statements showing the prices paid therefor and that these prices had a bearing on the fairness of the plan, the Circuit Court replied that the

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[1]Cert. den. October Term 1940, No. 465.

filing of the statements would not have benefited Standard, absent fraud on the part of the security holders.

QUESTIONS PRESENTED

1. Since the Debtor has not been found to be insolvent, and since provision has been made for the full satisfaction of the prior rights of creditors, leaving only the participation of stockholders to be determined, may a plan of reorganization under the Bankruptcy Act, as amended, entirely exclude from participation Standard as a subordinated creditor, and the common stockholders (of which Standard is the largest) without their consent?

2. As a cognate question: Does the rule of absolute priorities apply to the adjustment of the rights of preferred stockholders, a subordinated creditor (Standard) and the common stockholders, where the Debtor is solvent and the provision has been made for the full satisfaction of the prior rights of the creditors?

3. Since the plan of reorganization excludes Standard, as a creditor, from participation, was it properly approved as fair and equitable, taking into consideration:

   a. Standard's amended claim for $6,129,248.36, of which $1,000,000 is for moneys paid directly to the holders of notes on account of interest, $597,129.75 represents moneys paid directly to the holders of preferred stock on account of dividends and $1,300,428.98 represents moneys provided to the Debtor for the purpose of enabling it to pay essential operating and corporate expenses (all between February 24, 1928 and February 28, 1933).

b. The transfer by Standard, as directed by the District Court, of the stock and note of the Refining Company, the Bradstreet Properties and the Cracking Plant, representing a net cash investment of Standard of $2,082,026.30 from which Deep Rock and its security holders benefited.

c. That since the beginning of the receivership of Deep Rock in 1933 "speculators" have acquired notes of the Debtor at prices as low as 20% of the principal amount thereof "flat" (*i.e.*, inclusive of accrued interest since March 1, 1933) and preferred stock at prices as low as (and less than) $5 per share, and that the plan of reorganization recognizes a priority in favor of such "speculators" over Standard to the extent of principal of the notes plus interest since March 1, 1933 at the rate of 6% per annum and the par value in liquidation of the preferred stock with dividends thereon at the rate of $7 per share per annum since 1931.

d. The evidence received by the District Court in February, 1940 (R. 1264-1271, 1275-1276, and 1297-1307) after the decision by this Court in the *Taylor* case.

REASONS FOR GRANTING CERTIORARI

A. The Circuit Court of Appeals has decided important questions of law which have not been but which should be settled by this Court.

We state briefly what these questions are; we believe that this statement will show the importance of the questions and the need for their final settlement by this Court.

1. Where a Debtor is solvent and where provision has been made for the satisfaction of the full prior rights of creditors, Sections 179 and 216(7) and (8) of the Bankruptcy Act, contemplate that the rule of relative priorities should apply to the adjustment of the rights of several classes of stockholders.

We respectfully submit that this question was not involved in *Case* v. *Los Angeles Lumber Products Co. Ltd.*, 308 U. S. 106, 60 S. Ct. 1, 84 L. Ed. 110 (1939), where, as in *In re 620 Church Street Bldg. Corp.*, 299 U. S. 24, 81 L. Ed. 16, 57 S. Ct. 88 (1936), the Debtor was insolvent. Nor was the question involved in *In re Consolidated Rock Products Co.*, U. S. (October Term, 1940, Nos. 400 and 444), where, quoting from *Louisville Trust Co.* v. *Louisville, New Albany and Chicago Railway Co.*, 174 U. S. 674, 684, this Court held that " 'any arrangement of the parties by which the subordinated rights and interests of the stockholders are attempted to be secured at the expense of the prior rights' of creditors 'comes within judicial denunciation' ". Here, the prior rights of creditors have been fully satisfied; the question is whether the rule of absolute priorities applies to the adjustment of the rights of the preferred stockholders, the subordinated creditor (Standard) and the common stockholders. This question has not yet been passed on by this Court.

2. Does equity require the reorganization court, in this case, to take into consideration in the determination of whether the plan is fair and equitable to Standard the actual prices paid by holders of notes and preferred stock who acquired such securities during the pendency of the reorganization proceedings at discounts below their face

value? The plan of reorganization which was confirmed excludes Standard's fifty-eight thousand security holders, who (through Standard) have an investment of upwards of $20,000,000 in cash in the Debtor, from any participation in the assets of a solvent Debtor in favor of holders of notes and preferred stock who have acquired their securities during the receivership and reorganization proceedings at prices but a small fraction of the principal amount of such securities and who will inevitably gain a wind-fall no matter what provision may be made for Standard's protection. If priority over Standard is limited to the prices paid for securities (as low as 20¢ on the dollar for notes, inclusive of six or seven years of accrued interest, and as low as $1 a share for the preferred stock, inclusive of seven or eight years of accrued dividends of $7 per share per annum), would the note holders and preferred stockholders be treated unfairly if Standard were then to be permitted to participate?

B. A second reason why certiorari should be granted is that the Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same question.

In *Campbell* v. *Alleghany Corporation,* 75 F. (2d) 947 (1935), cert. den. 296 U. S. 581, the Circuit Court of Appeals for the Fourth Circuit took the view that, in the case of a solvent company, "Any plan must be accepted by the holders of a majority of the stock affected as well as approved by the court, or, if the consent of a majority be not obtained, their equity must be fully protected by the court in one of the methods prescribed in the act." This view is in conflict with the decision below.

C. A third reason why the writs of certiorari should be granted is that it is necessary in order to permit the correction of a grave injustice.

A grave injustice and inequity has been done to the public security holders of Standard (R. 1268) whose interests have been entirely excluded from participating in the reorganization of Deep Rock.

Since 1928, $1,000,000 of Standard's money went directly to the note holders of the Debtor and $597,129.75 of Standard's money went directly to the preferred stockholders of the Debtor (R. 1269); nevertheless, Standard is excluded from participation for the benefit of the very persons who received these moneys. Standard is excluded because holders of notes, many of whom have purchased at a substantial discount below the face amount thereof, with full knowledge of Standard's contention that it has the right to participate and of Standard's equities, by the orders which petitioner seeks to have reviewed, are held entitled to collect interest at the rate of 6% per annum since 1933—not on the amount they paid for their notes but on the principal amount thereof.

The courts below have obviously made an erroneous assumption that since, under the *Taylor* case, Standard's right to participate in the reorganization must be subordinated, they are precluded from taking into consideration on the subject of fairness of the plan the subsequent evidence bearing directly on the issue of fairness. After the decision in the *Taylor* case, evidence was received by the District Court directly negating the inferences which appear to be the rationale of the decision by this Court in the *Taylor* case (R. 1296-1307). We submit that a court of equity in passing upon the fairness of a plan of reorganization was bound to take into consideration that evidence.

The plan of reorganization is unfair in its exclusion of Standard under the doctrine expressed by this Court in *Southern Pacific Company* v. *Bogert,* 250 U. S. 483, 39 S. Ct. 533, 63 L. Ed. 1099 (1919), and in *Thomas* v. *Brownville etc. R. Co.,* 109 U. S. 522, 526, 3 S. Ct. 315, 27 L. Ed. 1018, 1020 (1883). The District Judge recognized the unfairness to Standard, stating:

> "I agree with you it is inequitable to subordinate your claim to the full amount of these note holders, taking into consideration the actual consideration paid by speculators for their notes pending this bankruptcy proceeding, but the Supreme Court of the United States in this case, without going into details, said your claim must be subordinated to the note holders and to the preferred stockholders" (R. 1314).

While recognizing the unfairness of the plan (R. 1309, 1314), the District Judge considered himself precluded from giving effect to his views when the issue of fairness of the plan came before him. This erroneous view, petitioner submits, resulted in the confirmation of an unfair plan. Fairness demands that Standard should not be cut off permanently from participation in the assets of Deep Rock, which, the Circuit Court found, are susceptible of rapid increase in value (R. 1377).

PRAYER

WHEREFORE, petitioner respectfully prays that Writs of Certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Tenth Circuit commanding that Court to certify and send to this Court, on a day certain to be

therein designated, a full and complete transcript of the record and of all proceedings in this cause, to the end that this case may be reviewed and determined by this Court; and that the said decrees of the said Circuit Court of Appeals in the said cases, and every part thereof, may be reversed by this Court; and that petitioner may be granted such other and further relief as may be appropriate.

Dated: New York, March 14, 1941.

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